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No. 82-1007

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN F. NIESZNER, PETITIONER

v.

VERNE ORR, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends that the court of appeals erred in dismissing his challenge to an Air Force regulation that imposes an age limitation on admission to the Outstanding Airmen Commissioning Program.

1. Petitioner, a technical sergeant in the Air Force Reserve, was denied a position in the Outstanding Airmen Commissioning Program on the ground that he was 36 years old; an Air Force regulation requires that applicants for this program not have reached age 35 (Pet. App. E-2). Petitioner then brought this suit in the United States District Court for the District of Minnesota, asserting that

the regulation was unconstitutional and seeking declaratory and injunctive relief.[1]

The district court dismissed the complaint, holding that petitioner's claim "is not reviewable" (Pet. App. D-3). In reaching this conclusion, the court applied the "four-factor test" for the reviewability of military actions prescribed by *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971). The first factor is "[t]he nature and strength of the plaintiff's challenge"; the district court ruled that this factor militated against reviewability because "there is no constitutional right to be commissioned in the Air Force Reserve or to serve in the armed forces at all" (Pet. App. D-2). The second factor is "[t]he potential injury to plaintiff if review is declined"; the district court concluded that petitioner's "injury is speculative" because the ultimate decision whether

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[1]Petitioner also sought $500,000 in damages "against the Defendants" (Complaint 3). The complaint does not specify whether damages were sought from the defendants in their personal capacity or in their official capacity. But one of the named defendants was dismissed from the case by stipulation of the parties, and the other named defendant was respondent's predecessor as Secretary of the Air Force; petitioner has substituted respondent (Pet. 2). The complaint contains no allegation that either respondent or his predecessor was personally involved in the alleged wrongs of which petitioner complains. It therefore appears that petitioner does not seek damages against any official personally. Neither the district court nor the court of appeals treated the complaint as presenting a personal damages claim. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

We note that the district court lacked jurisdiction over a claim for damages against the United States (or against respondent in his official capacity) both because the government has not waived its sovereign immunity from damages claims based on alleged violations of the Due Process Clause of the Fifth Amendment (see, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 400-402 (1976); *Duarte* v. *United States*, 532 F.2d 850, 852 (2d Cir. 1976)) and because a claim for $500,000 in damages from the United States would have to be brought in the United States Claims Court (28 U.S.C. 1346(a)(2) and 1491).

to appoint him an officer would have been "a matter of Presidential discretion" (*ibid.*). The third and fourth factors are "[t]he degree of interference with military function[s]" and "[t]he extent of military expertise or discretion involved"; with respect to these factors, the district court noted the "need for a young, vigorous officer force," and commented: "Courts should defer to the superior knowledge of experienced military professionals in matters such as promotions." *Id.* at D-3.

The court of appeals affirmed (Pet. App. E-1 to E-6; 684 F.2d 562). Describing petitioner's constitutional claim as "tenuous at best" (*id.* at E-5), the court of appeals endorsed the district court's application of the *Mindes* test (*id.* at E-5 to E-6).

2. Petitioner makes no argument designed to show that the court of appeals should have sustained his constitutional challenge to the Air Force's age limitation. Moreover, petitioner does not dispute the premises of the decisions of the court of appeals and the district court — that his constitutional claim is insubstantial, that his alleged injury is speculative, and that the military judgments that the age limitation reflects are entitled to deference. Instead, petitioner asserts (Pet. 9-10, 14-15) only that his claim is justiciable and that the court of appeals' decision conflicts with *Dillard* v. *Brown*, 652 F.2d 316 (3d Cir. 1981). But *Dillard* did not involve a challenge to military promotions, commissions, or distinctions based on age, and petitioner points to nothing in *Dillard* suggesting that his claim would have fared better before the *Dillard* court.

The court of appeals in *Dillard* "decline[d] to adopt the [*Mindes* v. *Seaman*] formula" on the ground that *Mindes* "intertwines the concept of justiciability with the standards to be applied to the merits of the case." 652 F.2d at 323. The *Dillard* court stated (*ibid.*): "Even if * * * a constitutional

challenge appears weak or frivolous, jurisprudentially that claim should be rejected on the merits, rather than deemed to be non-justiciable by a federal court." The differences between, on the one hand, the approach of *Mindes* and the court below, which consider "reviewability" or "justiciability," and, on the other hand, the *Dillard* court's concern with the merits, appear to be more a matter of terminology than substance: both approaches require a court to consider the substantiality of the plaintiff's claim, the extent to which the challenged action or determination reflects military expertise, and the importance of the parties' respective interests.[2] It is far from clear that the two approaches even attach different weight to these various considerations. This Court's decisions have taken into account essentially the same considerations, and often have recognized that a determination not to intrude courts into military affairs can derive not only from the merits of a claim but also from concerns similar to those underlying the political question doctrine and other aspects of justiciability. See, *e.g.*, *Gilligan* v. *Morgan*, 413 U.S. 1, 10-12 (1973). See also *Rostker* v. *Goldberg*, 453 U.S. 57, 64-66 (1981); *Orloff* v. *Willoughby*, 345 U.S. 83, 88-95 (1953).[3]

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[2]Cf. *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968), quoting *Poe* v. *Ullman*, 367 U.S. 497, 508 (1961) ("Justiciability is itself a concept of uncertain meaning and scope. * * * 'Its utilization is the resultant of many subtle pressures * * *' ").

[3]Petitioner also relies (Pet. 18-20) on *Crawford* v. *Cushman*, 531 F.2d 1114 (2d Cir. 1976). But the court in *Crawford*, like the court below, considered the question of reviewability to be distinct from the merits. See *id.* at 1119-1121. Petitioner's suggestion (Pet. 19) that the Second Circuit rejected the *Mindes* approach is incorrect. The claim in *Crawford* was found reviewable; but it concerned alleged discrimination on the basis of sex and an alleged deprivation of an interest that the Second Circuit considered to be constitutionally protected. See 531 F.2d at 1121.

In any event, whatever the divergence between the court of appeals' approach and that of *Dillard* on the abstract, "jurisprudential[]" level (*Dillard* v. *Brown, supra,* 652 F.2d at 323), petitioner fails to show why the *Dillard* approach would be more favorable to him. The government has great latitude in classifying on the basis of age (see *Vance* v. *Bradley,* 440 U.S. 93, 97 (1979); *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 312-314 (1976)); the Air Force's age limitation is plainly related to the objective of maintaining a young officer corps, particularly among the junior grades; and courts are not well equipped to second-guess military judgments about the importance of that objective. See *Rostker* v. *Goldberg, supra,* 453 U.S. at 64-68, 70-71. There is accordingly no reason to believe that petitioner's claim would succeed "on the merits" to any greater extent than it did in the courts below.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[4]As we noted (page 2 note 1, *supra*), petitioner's treatment of the damages claim in this case suggests that it is not a *Bivens*-type personal damages claim. The question presented in *Chappell* v. *Wallace,* cert. granted, No. 82-167 (Nov. 1, 1982), is therefore not implicated here. In any event, even if the complaint were read to state a claim for damages against respondent personally, petitioner's contention would not merit review by this Court for the reasons we have stated above, irrespective of the disposition of *Chappell.* Moreover, even if this Court were to uphold the Ninth Circuit's ruling in *Chappell* that the reviewability of military actions in the context of a personal damages suit should be judged by application of the four-factor *Mindes* test, it would not assist petitioner, because the court below dismissed his complaint after applying the *Mindes* standards.

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